

Ma (Migration) [2020] AATA 5887 (6 November 2020)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Ms Li Ma Master Zhe Yang
CASE NUMBER:	1928479
DIBP REFERENCE(S):	BCC2016/4331305
MEMBER:	Justin Owen
DATE:	6 November 2020
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision to cancel the first named applicant's Subclass 100 (Spouse) visa. The Tribunal has no jurisdiction with respect to the other applicant.

Statement made on 06 November 2020 at 1:01pm

CATCHWORDS

MIGRATION – cancellation – Partner (Migrant) (Class BC) visa – Subclass 100 (Spouse) – Federal Circuit Court remittal – ground for cancellation – incorrect information in visa application – failure to disclose previous marriage and child from previous relationship – consideration of discretion – expectation of basic and straight-forward information – grant of visa at least partly based on incorrect information – delegate's assessment compromised by the absence of correct information – circumstances giving rise to the non-compliance – fear of sponsor's family's reaction – applicant's psychological and mental health – best interests of the child – s.375A certificate – decision under review affirmed
1.

LEGISLATION

Migration Act 1958 (Cth), ss 99, 101, 107, 109
Migration Regulations 1994 (Cth), r 2.41

CASES

Feng Guo v Minister for Immigration and Border Protection [2018] FCCA 1173
MIAC v Khadgi (2010) 190 FCR 248

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration to cancel the first named applicant's Subclass 100 (Spouse) visa under s.109(1) of the *Migration Act 1958* (the Act).
3. The delegate cancelled the visa on the basis that the applicant had not complied with s.101 of the Act which states: "A non-citizen must fill in or complete his or her application form in such a way that: (b) no incorrect answers are given or provided." The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.
4. The delegate's decision was affirmed by the Tribunal on 19 July 2018. The applicant appealed to the Federal Circuit Court for judicial review of the Tribunal's decision. On 3 October 2019 the Federal Circuit Court made orders by consent quashing the Tribunal's decision of 19 July 2018 and remitting the matter to the Tribunal for reconsideration according to law.
5. For the purposes of the Tribunal's jurisdiction, the only decision that is before the Tribunal is that with respect to the first named applicant (the applicant). The other visa was automatically cancelled as a consequence of that cancellation, not by a decision but by force of the operation of s.140(1) of the Act. As no decision was involved in the visa cancellation under s.140(1), the Tribunal has no jurisdiction with respect to the other applicant.
6. The applicants appeared before the Tribunal on 9 September 2020 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Hanyao Ji. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
7. The applicants were represented in relation to the review by their registered migration agent. The representative attended the Tribunal hearing.
8. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss.101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.
10. The exercise of the cancellation power under s.109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s.107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the requirements in s.107, the power to cancel the visa does not arise. Extracts of the Act relevant to this case are attached to this decision.

11. In the present matter, the Tribunal is satisfied that the delegate had reached the necessary state of mind to engage s.107 and that the notice issued under s.107 complied with the statutory requirements.

Was there non-compliance as described in the s.107 notice?

12. The issue before the Tribunal is whether there was non-compliance in the way described in the s.107 notice, being the manner particularised in the notice, and if so, whether the visa should be cancelled. The non-compliance identified and particularised in the s.107 notice was non-compliance with s.101(b).

13. Particulars

14. On 13 November 2017 the Minister's delegate invited Ms Li Ma (the 'applicant') to comment on the delegate's intention to consider cancellation of Ms Ma's permanent Partner (Subclass 100) visa. The applicant had been granted a Subclass 100 visa on 2 September 2013. She had been sponsored by her Australian citizen husband, Mr Ji Han Yao.
15. The applicant responded on 22 November 2017.
16. On 12 December 2017 the Minister's delegate, having taken into account the applicant's response, decided to exercise discretion under s.109 of the Act to cancel the applicant's visa having decided that the applicant did not comply with s.101 of the Act. In that decision, the Minister's delegate concluded the reasons for not cancelling the applicant's visa did not outweigh the non-compliance.
17. Section 101 of the Act states: "A non-citizen must fill in or complete his or her application form in such a way that: (b) no incorrect answers are given or provided."

18. Claimed non-compliance

19. The Tribunal notes that the applicant previously provided the Tribunal with a copy of the delegate's decision as part of the review process. The delegate's decision provides a summary of the process leading to the claimed non-compliance.
20. On 17 August 2011 the applicant applied for her Subclass 309 Partner (Provisional)/ Subclass 100 Partner (Migrant) visa. The applicant's sponsor was Mr Ji Han Yao.
21. In her Partner visa application the applicant was asked 'have you ever been married before?' at Question 23. The applicant's response was that she had not.
22. At Question 24 the applicant was asked if she had ever been in a same-sex or opposite-sex de facto relationship before. The applicant responded she had not.
23. At Question 38 where the applicant was asked "Your Children" the applicant responded that she had "Nil".
24. Based (in part on the information above) the Minister's delegate found that the applicant was the spouse of her sponsor as defined under the Act and therefore met the criteria for the grant of the permanent Subclass 100 visa on 2 September 2013.
25. At the Tribunal hearing of 9 September 2020 the applicant confirmed this information.
26. As outlined in the delegate's decision record, on 16 February 2015 a Subclass 101 Child visa application was lodged by Master Yang Zhe, born 15 December 2006. The applicant

lodged with the Department a Form 40CH 'Sponsorship for a Child to Migrate to Australia' form where the applicant stated that Master Yang Zhe was her natural child. In support of her assertion the applicant provided the delegate Master Yang Zhe's notarised birth certificate as well as an English translation. The documents confirmed Master Yang Zhe's date and place of birth.

27. The delegate's decision also refers to a paper of Civil Mediation and English language translation issued by the People's Court of Yixiu District, Anqing City China dated 28 January 2014. In the document it refers to a custody dispute between the applicant and Mr Ding Fei, which was accepted by the Court on 26 December 2013. The document states that the applicant and Mr Ding Fei divorced by agreement of the court on 16 September 2008 and both parties agreed that Master Yang Zhe would live with Mr Ding Fei until he can live independently. The document stated that there was an agreement by the applicant and Mr Ding Fei that Master Yang Zhe reside with the applicant. If Master Yang Zhe was to live abroad with the applicant, it was agreed that he visit Mr Ding Fei when returning to PR China and to keep in touch in other ways.
28. The applicant also provided in support of her sponsorship application for Master Yang Zhe's visa an undated written statement explaining her reasons for why she was now sponsoring her child. The applicant explained she divorced in 2008 because she and her ex-husband were not compatible and her parents-in-law and ex-husband took care of her child as he was only one year old and not suitable to live in a foreign country. She wrote that in 2014 her ex-husband had been gaoled. At that time she pursued custody of her child which was awarded in 2014. The applicant wrote that she was now ready to raise her child and she was in employment.
29. At the hearing of 9 September 2020 the applicant confirmed that the information which had been provided in relation to questions 23 and 38 of Form 47SP was incorrect and she agreed there had been non-compliance. The applicant has confirmed that she was married previously and she had a child at the time of application. On the evidence before the Tribunal, the Tribunal finds that the applicant has provided incorrect information in her application for a Subclass 100 Partner visa at questions 23 and 38 of her Form 47SP.
30. The applicant discussed her relationship with Mr Ding Fei and claims that she was not in a de facto relationship with Mr Ding Fei prior to her marriage to him in May 2006. She claims no other previous de-facto or same-sex relationships. On the limited evidence before it, the Tribunal is prepared to accept her claim that she was not in either a de-facto or same-sex relationship prior to the lodgement of the Form 47SP. On the basis of the evidence before it, the Tribunal finds that the applicant did not provide incorrect information in question 24 which asked if she had ever been in a same-sex or opposite-sex de facto relationship before.
31. Given the clear evidence – and admission - that the applicant had been married before and did have a child at the time of the lodgement of her Form 47SP, the Tribunal finds that there was non-compliance with s.101 by the applicant in the way described in the s.107 notice.

Should the visa be cancelled?

32. As the Tribunal has decided that there was non-compliance in the way described in the notice given to the applicant under s.107 of the Act, it is necessary to consider whether the visa should be cancelled pursuant to s.109(1). Cancellation in this context is discretionary, as there are no mandatory cancellation circumstances prescribed under s.109(2).
33. In exercising this power, the Tribunal must consider the applicant's response (if any) to the s.107 notice about the non-compliance, and have regard to any prescribed circumstances:

s.109(1)(b) and (c). The prescribed circumstances are set out in r.2.41 of the Regulations. Briefly, they are:

- **the correct information**

34. Question 23 of Form 47SP asked the applicant '*Have you ever been married before?*' The correct response was a confirmation that she had been married previously. The applicant instead provided an incorrect response. Question 38 asked the applicant '*YOUR CHILDREN*': the applicant responded that she had 'NIL' children which was an incorrect response given Master Yang Zhe was born on 15 December 2006.
35. The correct provision of such basic and straight-forward information such as this correctly in a visa application is a reasonable expectation, particularly given the application was for a permanent visa. The Tribunal is of the view that the correct information in relation to the applicant's previous marriage and children is very significant and the failure to disclose weighs upon the credibility of the applicant. The Tribunal gives this consideration significant weight in favour of cancelling the visa.

- **the content of the genuine document (if any)**

36. There is no evidence before the Tribunal of non-compliance by the applicant with s.103 of the Act. The Tribunal gives this consideration no weight.

- **whether the decision to grant a visa or immigration clear the visa holder was based, wholly or partly, on incorrect information or a bogus document**

37. The Tribunal notes the applicant's previous written submissions, statutory declarations and oral testimony that if she had actually provided the correct information in her Form 47SP – that she had a child and was previously married – then she still would have been granted her 100 Partner visa based upon her genuine and continuing spousal relationship with the sponsor at that time. The Tribunal notes the applicant's claim that the information was essentially not relevant and was not a basis for the grant of the visa.
38. The Tribunal furthermore notes the claims that have been made that the provision of the incorrect information was inadvertent on the part of the applicant and there was no monetary incentive to make such a claim. The applicant has previously asserted through her submissions that the provision of this specific incorrect information was at the lower end of significance and seriousness. The Tribunal has considered the applicant's submissions but considers them to be speculative.
39. The Tribunal notes from *Feng Guo v Minister for Immigration and Border Protection* [2018] FCCA 1173 that when applying r. 2.41(c) of the Regulations and considering whether to cancel a visa under s.109 of the Act, the Tribunal is required not to 'speculate' on what might be the delegate's decision if they had been aware of the correct information, but instead to make an assessment of '*whether the incorrect information or bogus document was the basis, or part of the basis, for the decision to grant the visa or immigration clear the person.*' What is required by the Tribunal is '*consideration of the actual decision to grant the visa or immigration clear the person whose visa has been cancelled rather than to engage in speculation of what might have happened if there were correct information.*' The Tribunal has approached this consideration on this basis.
40. The Tribunal agrees with the applicant that a past marriage or a child from a previous relationship does not preclude someone from entering into a genuine spousal relationship and subsequently meeting the criteria for a Partner visa. That is an entirely reasonable and logical presumption. The Tribunal however has made its assessment as to whether the

incorrect information the applicant supplied about her previous marriage and children was the basis, or part of the basis, for the decision to grant her the Subclass 100 Partner visa.

41. The Tribunal notes that the decision by the delegate to grant the applicant her Subclass 100 Partner visa was whether the applicant was in a genuine and continuing relationship with her sponsor at the time of the Department's decision on 2 December 2013. This required the delegate to consider the financial aspects of the relationship; the nature of any household; the social aspects of the relationship and the applicant's and sponsor's commitment to each other.
42. The Tribunal finds the delegate's lack of knowledge of the applicant's child and previous marriage was directly relevant either wholly or partly, to the delegate's decision to grant the applicant a Subclass 100 Partner visa. The Tribunal considers the delegate was precluded from delving further into the claimed relationship between the parties due to the absence of this information.
43. The Tribunal discussed the absence of this information and the delegate's consideration of her Partner visa application in relation to the financial aspects of the relationship. The Tribunal discussed the sharing of finances between the applicant and sponsor. The Tribunal noted that the delegate was unable to explore areas such as whether the sponsor would have been willing to share finances and financially assist the sponsor's son if he moved to Australia with his mother. The applicant claimed that the sponsor would have confirmed to the delegate that that was the case and spoke of his good relationship with her son – she stated they had known each other since 2010 and the sponsor provided him with presents back in 2011. The sponsor in his own evidence said that he enjoyed a good relationship with the applicant's son. The Tribunal has taken into account the applicant's and sponsor's claims, but is not satisfied the delegate would not have undertaken further enquiries into the veracity of the applicant's claims had he been aware of her former marriage and her child.
44. Joint responsibility for children is an important assessment that is considered by the delegate in a partner visa when considering the nature of an applicant and sponsor's claimed household. The delegate, being unaware that the applicant had a child who could potentially be joining his mother at some time in Australia, was precluded from exploring with the sponsor his commitment to sharing joint responsibility for the child in the future. The applicant at the hearing spoke about how the sponsor and her son spent Christmas 2015 together. She stated that since January 2020 the sponsor – who both parties now claim are back in a genuine relationship together has been responsible for the costs of the household. The applicant at the hearing discussed at some length the sponsor's relationship with her son Master Yang Zhe and claimed the sponsor was the one that encouraged her to fight for custody of her son. She claimed the sponsor and her son have a very close relationship. The Tribunal has considered the applicant's claims but notes there was no opportunity for the delegate to test any of these claims given the failure to include the information concerning Master Yang Zhe and the applicant's former marriage on her visa application form.
45. In relation to the social aspects of the relationship and whether the relationship between the applicant and sponsor was socially recognised, the delegate was unable to explore with the sponsor and his family as to whether their acceptance of his relationship with the applicant would be adversely impacted by either the applicant having a child generally, or whether he the sponsor may later acquire joint responsibility for the child with the applicant. The Tribunal notes that there is no corroborative evidence before it that the friends and family of the applicant and sponsor were aware of the applicant's child and her previous marriage in their supporting declarations. The Tribunal notes from the delegate's decision record the applicant provided that the written statements from her and the sponsor made no reference to the sponsor being aware that the applicant was previously married and had a child. The

Tribunal recognises the applicant's and sponsor's oral testimony that the sponsor was well aware of her past relationship and her child well before the lodgement of the Partner visa application. The Tribunal finds the absence of this information from the delegate as troubling and as precluding him from exploring the social recognition the claimed relationship enjoys from family and friends on a more thorough basis. The Tribunal considers this is particularly pertinent given the claims the applicant and sponsor made that the sponsor's family was very conservative and would have had some issues with the applicant being both a divorcee and already having a child. The applicant stated at the Tribunal hearing that she and the sponsor never told her mother-in-law about her child and past marriage at the time of application because they needed her finances and they feared the sponsor would essentially be 'cut off' should his mother discover the truth. The fact that the sponsor's own mother had no idea of the marriage speaks to the social recognition of the relationship and was directly relevant to the delegate's assessment of the Partner visa criteria. Even if there were family issues as claimed, it did not absolve the applicant and sponsor of their obligations under the Act and Regulations to provide honest and correct information on the documentation supplied as part of the application process. The applicant and sponsor in their oral testimony each claimed the sponsor's mother since their divorce was aware of the applicant's past history and since 2018 accepts both the relationship and the applicant's past history. The Tribunal notes the desire of the applicant and sponsor at the time of application to conceal their relationship from the sponsor's mother. That does not in the Tribunal's mind justify concealment of this information from the delegate who would have considered this 'concealment' from close and immediate family members directly relevant to the criteria for the visa.

46. The Tribunal also considers the delegate's assessment of the nature of the applicant and sponsor's commitment to each other was also compromised by the absence of the information relating to the applicant's child and former marriage. The possibility of the applicant's young child joining the applicant in Australia was directly relevant, in the Tribunal's opinion, to the applicant and sponsor's ongoing commitment to each other. The delegate was precluded from considering and exploring with the sponsor matters such as what would be the impact upon himself and his own commitment to the applicant if the applicant's child was to come to Australia and essentially join him and the applicant in their household and family.
47. At the hearing the applicant and sponsor both claimed the sponsor was fully informed and aware of the applicant's history, including her child and past marriage. The sponsor claims he was first informed when he and the applicant were both studying in Japan. The claimed need at the time of application to ensure the sponsor's family was kept unaware of this information was discussed. This claimed need has been utilised by the applicant as justification for deliberately keeping the correct information concerning her child and former marriage off her Partner visa application: it was claimed that if the sponsor's family became aware of her child and previous marriage then they would put considerable pressure on the sponsor to end the relationship. The Tribunal notes that there is no evidence to substantiate this claim beyond the testimony of the applicant and sponsor; the Tribunal notes that the sponsor did in fact leave the applicant and divorce the applicant, but at the Tribunal's hearing the reasons given for their separation were more to do with his studies and desire to acquire qualifications in Japan than pressure from his family. The Tribunal gives the applicant's claim little positive weight. The Tribunal considered the applicant's evidence concerning the conclusion of the relationship with the sponsor curious: she stated at the hearing that their divorce was an 'impulsive' decision and she utilised the threat of divorce to ensure the sponsor remained with her rather than depart for Japan. In the Tribunal's opinion, such actions speak to the genuineness of the parties' commitment to each other and to the relationship. The Tribunal finds that the delegate was precluded from assessing the genuineness of the applicant and sponsor's commitment to each other and notes the relatively rapid conclusion of the relationship after the granting of the visa and subsequent

divorce – despite both parties now claiming at the hearing to be back in a relationship together since January this year – speaks to their commitment to each other at the time the visa was granted. If the delegate had been apprised of the correct information he would have been able to explore and assess the claimed relationship and the nature of their claimed commitment to each other more thoroughly.

48. The Tribunal considers the decision to grant the applicant her visa was at least partly based on incorrect information. The Tribunal gives the above consideration significant weight in favour of cancelling the visa.

- **the circumstances in which the non-compliance occurred**

49. The applicant has made extensive submissions on the circumstances in which the non-compliance occurred. The applicant concedes that incorrect information was provided to the Department in her Partner visa application in relation to her former marriage and her child. The applicant holds the sponsor, however, as essentially responsible for the incorrect information being supplied, and claims in fact she had no knowledge that the incorrect information had been provided until after receiving the Notice of Intention Consider Cancellation of her visa some years later. The applicant and sponsor both stated in their oral testimony that the incorrect information was supplied due to the sponsor's family being very conservative and they would have refused to accept the relationship due to the fact the applicant was previously married and had a child from her previous relationship.
50. The Tribunal has taken into account the information the applicant supplied to the Department and the Tribunal as part of the 2018 application for review. The Tribunal's decision *Ma 1731802* at paragraph 34 summarises the evidence submitted up until the time of decision in July 2018:

(1) Statutory Declaration of the applicant dated 22 November 2017 in which the applicant describes her marriage to her first husband Mr Fei Ding who was drug dependent and mixed with people of similar background. They were divorced on 16 September 2008 by Court order. She suffered from depression and attempted suicide on one occasion. Her parents decided that it would be better for her to go to Japan where she met her second husband Mr Hanyao Ji in April 2010. They decided that it would be best not to disclose to his family that she had been married previously with a child as that would bring shame. Hanyao told her that his parents have conservative values and he was concerned that she would be judged as a divorcee of a drug dependent person and a child. They married and she lodged an application for a Partner visa which contained incorrect information. During mid-2013, she discovered that her former husband was arrested on drug related charges. On 28 January 2014, and by Court order she obtained sole guardianship of her son. On 21 November 2014, her former husband was sentenced to a term of 14 years of imprisonment. Her marriage to her second husband did not work out after his family discovered her prior failed marriage and her son. She and her second husband are now divorced.

(2) Statutory Declaration of the applicant dated 26 June 2018. The applicant outlined how she arrived in Australia in 2012 with basic English and that she divorced her second husband in June 2015. She stated that she was not dating anyone. She indicated that:

- *She is an only child her parents are traditional Chinese who treated her very strictly. Her father was the head of police in Anqing, China and has now retired. Her parents emphasised the importance of education and she dedicated herself to study which she enjoyed. She became a qualified primary school teacher and taught in China.*

Subsequently, she became a television presenter and became a well-known celebrity in China, particularly in her local community. For much of the year, her mother or father visits her in Australia and they assist her to care for her son.

- She married Mr Fei Ding in 2006 and she found out earlier that year that she was pregnant. Mr Ding appeared to be a good person and he told her that he was a property developer but she later discovered that he was also a drug dealer. They divorced in September 2008 as a result of the pressure from members of her family.*
- At the request of Mr Ding's family, the Court in China ordered that her son be with his father and his family. She was desperate and felt hopeless.*
- She was only allowed to visit her son once a month who was looked after by her husband's family up until Mr Ding was arrested for drug related offences in 2013.*
- In April 2008, there was an article published in a tabloid paper about her and Mr Ding's criminal matter (copy of article provided). She felt immense public pressure and she attempted suicide but was rescued. Subsequent to the incident, her family did not put as much pressure on her as they had in the past and they provided her with support.*
- In January 2009, she travelled to Japan for about 15 days and later she was granted a Japanese student visa. She went to Japan in April 2010 and she met her second husband, Mr Han Yao Ji who was also known as Victor (sponsor for the Partner Visa). Mr Ji found out about her past. In around August 2010, they became boyfriend and girlfriend.*
- The earthquake and tsunami in Japan in March 2011 was shocking and she did not know what to do. In March 2011, she agreed to marry Mr Ji and they got engaged. She came to Australia to meet his family in Adelaide. He told her not to tell his mother about her past marriage because he was afraid that his mother would oppose the marriage. They married in May 2011 shortly after her arrival in Australia. Her son likes Mr Ji who is good with children. They planned to have children of their own but he wanted to get established prior to having a family.*
- In August 2011, they started to prepare her application for a Partner Visa. Her English was limited so Mr Ji asked his stepfather known as Barry to assist with completion of the forms. Mr Ji told her not to disclose to Barry her previous marriage or her son because he was concerned that Barry would tell his mother. She had "no choice, in fact, now idea, but to follow Mr Ji's and Barry's instructions". Although she was not sure where she should provide the relevant answers, she did ask Mr Ji several times to tell the truth but he told it would be fine and not to worry. She is regretful.*
- Around December 2012, she and Mr Ji's purchased a property and to her knowledge that property has been sold.*
- In mid-2013, she discovered that Mr Ding had been arrested and sentenced to a 14 year term of imprisonment. She returned to China and obtained guardianship of her son. In February 2015, she applied and sponsored her son to Australia who now lives with her. Her son is doing well at school.*
- Towards the end of 2012 Mr Ji continued his studies in gaming design and visual art and he was not working at that time. In mid-2014, Mr Ji informed her that he wasn't prepared to find a job in Sydney after his graduation as they had planned. On the*

contrary, he had planned to return to Japan to finish his studies. She was not sure if he was serious until she noticed that he was starting to apply for schools in Japan and prepare for entrance examinations. She was angry because she thought that after graduation he would start to work. He seemed indifferent about her feelings and did not discuss the future plans. He told her it was his dream and that he would rather separate from her for some years than live a life with no dream or hope. In April 2015, she lodged the divorce application with the help of a family friend called Terry. At that time she was only using the divorce application as a "tool to ask Mr Ji to stay" but he had made his final decision and went to Japan. They were divorced in June 2015. She was sad when the divorce was finalised.

- Mr Ji left to Japan in March 2016 to pursue his studies. Although they are now divorced, they have remained in contact. In around October 2017 he invited her to go to Japan for a 20 day trip (itinerary and hotel bookings attached). They have discussed the possibility of getting back together and remarrying in due course.
 - She sincerely apologises for the mistakes in her visa application and she did not have any intention to hide information. Had her English been better, this could have been avoided. Had they appointed a representative to assist with the Partner visa application, this would not have occurred.
- (3) Statement of Mr Hanyao Ji dated 21 November 2017 outlining how he and the applicant met in 2010 in Japan when he was studying. He confirmed his knowledge that the former husband had been drug dependent and that he had proposed to her in 2011 subsequent to the Japanese earthquake and prior to them finishing their studies in Japan. He stated that at that time, he knew that his family would not approve of the applicant being a divorced woman, with a child and a former husband of criminal background. He stated that his parents helped them in the applicant lodging the application for Partner visa which resulted in the inadvertent provision of incorrect information.
 - (4) Criminal ruling of the Higher People's Court of Anwei province of 21 November 2014 and its translation (folios 185-224) in relation to drug trafficking charges against the former husband.
 - (5) Medical certificate dated 30 November 2008 and its translation relating to the applicant's attempt to commit suicide. Medical records relating to the applicant for the period from 25 March 2007 until 2 March 2009.
 - (6) Work reference for the applicant, dated 15 November 2017 from the Client Service Manager of Data Airport Services Pty Ltd, noting that the applicant works 38 hours per week.
 - (7) PAYG payment summaries and Centrelink income statement for the applicant.
 - (8) Letter from Oakley Public School and school reports for Master Zhe Yang.
 - (9) Submissions dated 22 November 2016 acknowledging that incorrect information had been provided. Relevantly the submissions contended that had the applicant provided the correct information in her visa application, she nevertheless would have been granted the visa. The provision of the incorrect information was not to gain a migration advantage and there was no monetary incentive. The provision of incorrect information was on the lessor and of significance and seriousness. The existence of the prime marriage and the child did not preclude the existence of a genuine spousal relationship at the relevant time. The applicant acknowledges that the criminality on

the part of the former husband does not excuse her from the provision of incorrect information. The applicant was diagnosed with depression with repeated suicidal ideation and those eventually contributed to the non-compliance. The applicant is currently employed and provides for her child who is studying and progressing well academically. The applicant in the subclass 101 had disclosed the existence of the former marriage and the child which means that the provision of incorrect information was for the sole reason of protecting herself and her child from discrimination and harm. The best interest of the child is a primary consideration under the Convention on the Rights of the Child. It is in the best interest of the child that he would continue to have a meaningful relationship with his mother.

- (10) *Report of medical oncologist dated 23 May 2018 in relation to Mr Barry Dean Smith, who is the second husband's mother's partner.*
- (11) *Flight and accommodation details. Copies of photographs of the applicant, her son, Mr Ji and others. The applicant's son appears to be much younger than he is now.*
- (12) *Article and its translation in relation to the applicant regarding the publication of the applicant's former husband's drug trafficking offences.*
- (13) *Psychologist report of Mr Philip Gorrell, dated 25 June 2018 who interviewed the applicant and her son on 23 June 2018. Mr Gorrell discussed in detail the applicant's background and history of the pregnancy which occurred prior to her being married, causing embarrassment to her and to her family. He referred to the completion of the Partner visa application and the assistance that the applicant received from Mr Barry Smith who was not told of the applicant's former marriage and her son because Mr Smith would have told the applicant's step-mother. Mr Ji apparently attempted suicide in December 2012 and the applicant does not know the reasons. The applicant and Mr Ji are trying to reconcile their marriage. Master Zhe Yang was bullied in China because he did not have a mother and because of his father's drug offences. He would be bullied and ostracised if he were to return to China. He is doing well at school in Australia. Mr Gorrell referred to the applicant's background, having come from a good family with her father formally holding a senior position in the police service in China. Mr Gorrell noted that the applicant was a victim of trauma consequential to the Japanese earthquake in 2011 and she was reliant on Mr Ji for guidance. He assessed her as being "very genuine, very law-abiding and very positive about how she will continue contributing to Australia".*
- (14) *In a Statutory Declaration declared on 22 February 2018, Mr Han Ji discussed his relationship with the applicant and the fact that he was aware that she had previously been married and that she had a son. Mr Ji referred to asking his stepfather, Mr Barry Dean Smith to help with the partner visa application and that he had told her not to disclose her prior marriage or son, fearing that Mr Smith would disclose that information to Mr Ji's mother. He indicated that during the first three years of their marriage, they got along well and they planned to have a child but due to financial difficulties, they delayed that decision. They purchased a property as joint tenants in December 2012 but that property was later sold in June 2015 following their divorce.*

51. The applicant has provided further submissions to the Tribunal since the Court remittal. These include:

- Psychologist report of Ms Lois Li dated 16 March 2020 who interviewed Master Yang on 9 March 2020. Ms Li stated that Master Yang had been referred to her by the

applicant for psychological assessment and a management plan in relation to mental health issues. The report looked into Master Yang's current emotions and psychosocial functioning and was based on interviews with Master Yang, the applicant and an adviser from his school. Since the cancellation of the applicant's visa in 2017 Master Yang has ceased socialising and become angry. He was bullied at his high school and was suspended a number of times. Master Yang believes he will be bullied much more seriously if he returns to PR China and wishes to remain in Australia. He recalled he had previously seen a counsellor in 2019 after he was suspended. Ms Ma had stated that Master Yang had begun to change in July 2018 after the Tribunal affirmed her visa cancellation. In March 2019 her own depression had worsened after she lost her job because she lost the work rights on her visa. Her own emotions had an impact upon Master Yang. Master Yang's teacher reported mild behavioural issues but no aggressive behaviours were reported. Ms Li recommended a treatment plan and assessed Master Yang as "suffering from emotional, behavioural and social problems" since informed of the visa cancellation.

- Psychologist report dated 1 September 2020 for the applicant's son Master Zhe Yang. The report by Ms Lois Li of LL Counselling states that in Ms Li's opinion Master Yang meets the criteria for the diagnosis of Adjustment Disorder with Mixed Anxiety and Depressed Mood. The report is based upon administering Master Zhe Yang with a number of tests; Ms Li's previous report of 16 March 2020; correspondence from the applicant's representative dated 24 August 2020; Master Zhe Yang's 2020 school half yearly report; and a number of face to face interviews between 24 and 26 August 2020. Ms Li stated that Master Yang was suffering from emotional, behavioural and social issues since the cancellation of the visa, he had great concerns about returning to PR China and the stress of the uncertainty in relation to his visa was having a detrimental effect upon him. He had met with a clinical psychologist, Mr Norris Ma, over the telephone six times since March 2020. It was submitted by Ms Li that Master Yang's condition would improve if he were permitted to remain in Australia.
- Psychologist report dated 1 September 2020 for the applicant. The report by Ms Lois Li of LL Counselling states that in Ms Li's opinion Master Yang meets the criteria for the diagnosis of Adjustment Disorder with Mixed Anxiety and Depressed Mood. The report is based upon administering the applicant with a number of psychological tests; a previous psychological report of Mr Phil Gorrell dated 25 June 2018; Ms Li's statutory declaration of 26 June 2018; a Court Order from Judge Humphreys dated 3 October 2019; and correspondence from the applicant's representative dated 24 August 2020. Ms Li discusses in detail the applicant's background and history. Ms Li refers to the applicant telling her that in August 2011 the sponsor prepared her Partner visa with the help of his step-father because their English was not very good. She asserts that she agreed to the sponsor's suggestion of not mentioning it in the application which she now regretted. The applicant has suffered from emotional and social problems since informed her visa was cancelled and these worsened after the Tribunal affirmed the cancellation in 2018. It was submitted by Ms Li that the applicant's condition would improve if she were permitted to remain in Australia.
- Three photographs of the visa applicant together with the sponsor and the visa applicant's son Master Yang.
- Correspondence addressed to both the applicant and sponsor from a real estate agency dated 19 May 2020 relating to a rental property.
- An undated Change Shared Tenancy Arrangement in the names of and signed by both the applicant and sponsor.

- Photographs of gifts and receipts for gifts purportedly sent to the applicant and Master Yang from the sponsor
- Receipts for return flights to Japan in April 2018 in the name of the applicant and Master Yang.
- 2016 and 2017 school reports for Master Yang.
- A 21 June 2018 translation of a media article stating the applicant's then husband Mr Fei Ding was arrested and held in criminal detention for alleged drug-taking and possession of the drug 'ice'.
- The applicant's 26 June 2018 statutory declaration was again submitted as discussed previously.
- The sponsor's 22 February 2018 statutory declaration was again submitted as discussed previously.

52. The applicant also made a further statutory declaration dated 2 September 2020. The applicant indicated that:

- The sponsor, her ex-husband, is currently her de facto partner. After her divorce from the sponsor in 2015 the sponsor expressed his regrets and asked if it were possible to resume their marriage. It is claimed the sponsor asked for three years so he could return to Japan to follow his dreams concerning study. The applicant claims she and the sponsor remained in touch almost every day.
- Between the divorce and the sponsor leaving for Japan in March 2016, the parties spent time together socially on a regular basis.
- After the sponsor moved to Japan, he continued to send gifts to the applicant and Master Yang. Each year during school holidays the sponsor would return to Sydney and spend about a week with the applicant and Master Yang.
- The sponsor enjoyed a good relationship with Master Yang.
- In February 2018 whilst in Adelaide the sponsor's mother told the applicant that they were supportive of her and she and Master Yang were now accepted as members of the sponsor's family. The applicant was surprised due to her previous issues with the sponsor's mother.
- In mid-October 2019 the applicant and Master Yang moved to Summer Hill. The sponsor visited when he was over from Japan and stayed for four days. The applicant and sponsor discussed re-marrying. In November 2019 he sent messages to the applicant that he wanted to return to her as soon as possible.
- On 24 January 2020 the sponsor returned to Adelaide and spent two weeks with his family before coming to Sydney in mid-February 2020, where the applicant and sponsor began cohabiting as well as signing a joint lease and opening a joint bank account. The sponsor was having his salary paid into the joint bank account from the restaurant he was working at.
- With the COVID-19 pandemic emerging, the sponsor returned to Adelaide to care for his elderly parents. He stated he would return to Sydney once the pandemic ended.

He transferred his assets to the applicant and continued to send the applicant monies from his wage in Adelaide.

- In early August 2020 the sponsor told the applicant that his mother now completely accepted the applicant and her son Master Yang.
- The applicant and sponsor's plan to reunite has been delayed because of the COVID-19 pandemic. They now plan to move to Adelaide and remarry there. The sponsor plans to sell a property his family owns in Sydney. The applicant would like to have a baby with the sponsor in the future to provide a sibling to her son.

53. The sponsor made a further statutory declaration dated 3 September 2020. The sponsor indicated that:

- From his understanding, he and the applicant divorced as he did not include her in any future plan at that time, including his insistence on travelling to Japan to continue his studies. He denies he was indifferent to the applicant's feelings but rather was not a good communicator.
- He regretted the divorce in mid-2015 and asked the applicant a few weeks after if she'd consider re-marriage.
- The applicant had some reservations. He lived with the applicant until he departed for Japan in March 2016 where he studied silver crafting and jewellery design until March 2019.
- Whilst in Japan he kept in close contact with the applicant. He would send the applicant and Master Yang gifts.
- When on holidays from his studies in Japan each February and July he would return to Australia and stay for a week where he would visit the applicant and Master Yang in Sydney. Whilst there they would live like a family for around four days.
- He witnessed Master Yang's character change dramatically after the commencement of the applicant's visa case and he became more disobedient. He stated the applicant said Master Yang preferred talking to him rather than her as he understood him better.
- In February 2018 he invited the applicant and Master Yang to Adelaide for Chinese New Year which was the first time his mother met Master Yang. He said the visit was a success and his mother accepted the applicant and Master Yang.
- In March 2019 back in Japan he graduated and found a job in a silverware shop. His loneliness and feelings for the applicant made him wish to return to Sydney.
- In mid-October 2019 he returned to Sydney and he, the applicant and Master Yang began residing together. He expressed his commitment to the applicant and Master Yang during this visit.
- In January 2020 he returned to Adelaide before arriving in Sydney on 11 February 2020 to live with the applicant and Master Yang in Summer Hill. He found a job and established a joint bank account with the applicant.

- He lost his job at the start of the COVID-19 pandemic, and his mother asked him to return to Adelaide as it was safer. He returned to Adelaide whilst the applicant was to stay in Sydney to complete her current appeal at the Tribunal.
 - In March 2020 before he returned to Adelaide he gave all his savings to the applicant.
 - He keeps in contact with the applicant every day. He and the applicant have plans to reside ultimately in Adelaide together with Master Yang.
 - He states the applicant would like a baby but he is still unsure at this stage.
54. The applicant's and sponsor's oral testimony at the lengthy Tribunal hearing was generally consistent with their declarations and the broader evidence submitted.
 55. The Tribunal accepts the applicant's claims that the sponsor's family was conservative and that they may have entertained some concerns as to her previous marriage (particularly given her former husband's incarceration) and child. The Tribunal accepts the applicant and sponsor have been known to each other for a considerable period of time since they met in Japan.
 56. The Tribunal discussed in some length with the applicant and sponsor the specific circumstances surrounding the preparation of the Partner visa application form and just how information so obviously wrong – and easily refuted – was included in the form.
 57. The applicant has asserted that she wished to keep quiet from the sponsor's family the fact that she had a past marriage to a convicted criminal; that she was a divorcee and she already had a child. Whilst the sponsor was aware of her history, no other members of his family knew. The applicant stated that she and the sponsor had a concern that if the sponsor's mother especially was aware of her genuine situation as a divorcee and mother then she would oppose the relationship.
 58. The applicant stated that at the time she did not speak English and the Partner visa application forms were filled in by the sponsor and his stepfather. The process as described was the sponsor was asking her questions in Mandarin as the forms were filled out by the sponsor's stepfather. The sponsor, after receiving a response from the applicant, would interpret that into English which the sponsor's stepfather would then fill out.
 59. The applicant stated that she had no idea at the time that questions 23 and 38 – asking whether she had previously been married and whether she had any children – had even been asked. She essentially claims that she had no idea that the questions even appeared on the visa application forms. She claims her first awareness that she had supplied false responses to questions 23 and 38 was in fact when she received the Notice of Intention to Consider Cancellation of her Partner visa years later. The applicant denied the sponsor had discussed these questions with her – and any response - at any point in the visa application process, either prior to filling out the relevant paperwork or at any time subsequent. The applicant claims the sponsor never informed her that he had provided incorrect answers to questions 23 and 38 to his stepfather whilst he filled out the forms. The sponsor generally agreed with this explanation in his own testimony at the Tribunal's hearing.
 60. At the hearing the sponsor stated that his stepfather Barry had filled out the forms whilst he the sponsor supplied the responses. He stated that Barry had in fact asked him Questions 23 and 38 – and he, the sponsor decided to answer in the negative to the questions. The Tribunal asked whether he had informed the applicant that these questions had been asked: he said no, he never told her at the time or subsequently. The sponsor conceded he knew

the information he provided was wrong but he was motivated by fear of his mother's and family's reaction if they knew the correct answers regarding the applicant's former marriage and child.

61. The sponsor told the Tribunal that he thought about trying to correct the form and supply the right responses but was unable to get the forms back from his mother who was lodging the form herself. He claimed the applicant asked him if he had filled out the form correctly and he responded that she shouldn't worry. He states that he never told the applicant what he had done and he never corrected the record with the Department as he didn't know what to do. He claims he was unaware the form could be amended. He stated the applicant was in shock when she texted him in 2017 – now in Japan – informing him of the notice she had received from the Department to cancel her visa. The Tribunal asked the applicant what would have been the outcome if his mother had known and he had informed her of the truth relating to the applicant. He stated that there was a big chance she would be angry.
62. The Tribunal has considered both the applicant's and sponsor's explanations but considers them to be fanciful. The Tribunal finds it unfathomable that both the applicant and sponsor agreed that there was a need to keep the truth concerning the applicant's past marital relationship and child from the sponsor's family – but there was apparently no discussion or agreement at any point as to how this matter would be addressed in the Partner visa application should it be raised. The applicant has stated that the sponsor independently and unilaterally decided to take it onto himself to not inform her that the questions were being asked before providing false answers to his stepfather filling out the forms. Furthermore, the applicant has claimed that the sponsor then failed to even raise what he had done with her: despite her past marital relationship and child being a significant concern (in relation to the sponsor's family) that the parties had discussed. The Tribunal considers this explanation defies credulity, despite the sponsor's agreement with these claims.
63. The Tribunal asked the applicant why, as she previously claimed, Master Yang may have been harmed if she told anyone other than the sponsor about her child and her previous marriage. The applicant responded that if her former husband had not been a convicted criminal then this would not have been an issue. She pointed out that she had been named in the media after he was charged with criminal offences relating to drugs. She stated she didn't want her son to face such issues. The Tribunal accepts that these matters may have been awkward and uncomfortable for the applicant. It does not, however, absolve the applicant from the responsibility to provide the delegate with the correct information when lodging a Partner visa application.
64. The Tribunal noted at the hearing that the applicant could have notified the Department of the need to keep any information supplied concerning her former marriage and child private and confidential. The applicant stated that she did not know the questions had even been raised. The applicant stated that if she and the sponsor had a migration agent at that time then these mistakes concerning the failure to include relevant information could have been avoided. She stated that if she had known those questions were going to be asked then she would have found someone else other than the sponsor's stepfather to prepare the documentation. The Tribunal finds such explanations unconvincing. The Tribunal considers there is a clear and unequivocal requirement to provide information which is factual and correct in a Partner visa application. The Tribunal considers questions in relation to a previous marriage or child are so straightforward that the applicant's claim she would not have made such an error if she used a migration agent is somewhat disingenuous. The questions were straight forward even without the advice and assistance of a professional representative. If there were questions, then they could have been directed at the Department.

65. The applicant has previously raised her depression and mental health as a reason as to why the non-compliance occurred. The Tribunal notes the evidence previously submitted of medical treatment between 2007 and 2009. The applicant has also previously raised the impact of the 2011 Japanese earthquake as impacting upon her ability to provide the correct information to the delegate, and the provision of this incorrect information in her Partner visa application in relation to her child and previous marriage was beyond her control. The Tribunal considers this claim stands in contradiction to her claim at the hearing that she was simply unaware that information pertaining to her former marriage and her child was even requested. The Tribunal accepts the applicant has faced a range of issues that have had an impact upon her psychological health. The Tribunal does not, however, accept that these challenges impacted upon her in such a way that she was unable to supply the correct information to the delegate in her Partner visa application. The Tribunal does not consider the applicant's psychological and mental health meant that the provision of the incorrect information to the Department was beyond the control of the applicant.
66. The Tribunal has considered the applicant's and sponsor's testimony and the extensive written submissions before it. The Tribunal is not persuaded by the applicant's explanation for the supply of false information to the delegate in relation to her previous marriage and child. The Tribunal accepts that the sponsor's stepfather filled out the Partner visa application forms on the instructions of the sponsor who was receiving the relevant information from the applicant. The Tribunal is not convinced, however, that the applicant was not aware that there were questions pertaining to previous marriages and children as part of the Partner visa application process when they were undertaking the application process. The Tribunal is of the opinion that the applicant and sponsor were both aware of the questions and deliberately decided to withhold the information. Whilst the Tribunal accepts there may have been reasons – such as the sponsor's family – as to why they chose to do this, ultimately the information was withheld and the responses given to the relevant questions were demonstrably false.
67. The Tribunal notes s.99 of the Act makes it clear that any information a non-citizen gives or provides, or causes to be given or provided, or that is given or provided on their behalf in relation to the non-citizen's application for a visa, is taken to be information given or provided to be an answer to a question in the non-citizen's application form. The Tribunal accepts that the sponsor's stepfather under instructions completed the Partner visa application forms and received interpreted responses from the sponsor who was in contact with the applicant whilst the forms were completed. The Tribunal is of the firm opinion that those responses – and the withholding of the correct information – were intentionally false and supplied with both the knowledge and the consent of the applicant.
68. Having considered the extensive evidence before it both individually and cumulatively and having considered the circumstances in which the non-compliance occurred, the Tribunal is not satisfied with the applicant's explanation for the non-compliance. The Tribunal has considered the challenges the applicant and her son have faced, but it does not consider they provide either a plausible or convincing explanation as to the non-compliance.
69. The Tribunal gives the above consideration significant weight in favour of cancelling the visa.

- **The present circumstances of the visa holder**

70. The Tribunal has considered the present circumstances of the applicant. The Tribunal notes that since her visa was cancelled by the delegate, the applicant claims to have re-established her relationship with the sponsor who has returned from Japan. The applicant told the Tribunal her life has changed considerably since the cancellation.

71. At the hearing the applicant told the Tribunal about her life after divorcing the sponsor. She stated she moved to Oatley and began working in a job at Sydney Airport. She stated throughout 2016 she and her son, Master Yang, had a happy life. Cancellation of her visa and the subsequent upholding of the Department's cancellation by the Tribunal had led to her life breaking down with depression and anxiety. She stated she lost her work rights due to the cancellation and in February 2019 lost her job. She has been without employment since that time. She stated Master Yang similarly faced mental health challenges due to the uncertainty generated by the cancellation of the applicant's visa.
72. The Tribunal asked the applicant about her relationship with the sponsor that both now claimed had resumed. The applicant stated that even when she and the sponsor separated, they maintained a cordial relationship. Indeed, the applicant said that she and the sponsor had not separated in a general sense: she stated that she had impulsively used the threat of divorce in an attempt to stop the sponsor from returning to Japan for his studies. The Tribunal noted that the applicant and sponsor needed to be separated for a minimum of 12 months, so how could the decision to divorce be impulsive. The applicant responded that they remained in contact on a daily basis because they were a couple. She claims that she and the sponsor essentially never 'recommenced' their relationship as it never really ended. She stated that the sponsor said after they were married that he needed three years in Japan to finish his studies. She said that she considered three years too long and said she would see how things were at after he graduated.
73. The applicant and sponsor claim they are in a genuine and continuing relationship at present. The applicant and sponsor are not living together – the sponsor flew from Adelaide to Sydney to provide supportive oral testimony before returning that day. Both parties have claimed they are in a good relationship, with the sponsor's mother now accepting of both the applicant's previous marriage and her son Master Yang.
74. The sponsor has been in Adelaide since the commencement of the COVID-19 pandemic. He states he is there to care for his elderly parents. The applicant and sponsor claim they plan to move to Adelaide and remarry there. The applicant stated she would like to have a baby with the sponsor in the future to provide a sibling to her son. The Tribunal notes the applicant's and sponsor's claim that the applicant transferred his assets to the applicant and continued to send the applicant monies from his wage in Adelaide.
75. In relation to the sponsor and her child Master Yang, the applicant stated that he is doing an outstanding job. The applicant states that Master Yang has no relationship at all with his biological father. She stated the sponsor is more patient with her son than she is and plays PS4 video games with Master Yang.
76. The applicant talked about her mental and psychological health. The Tribunal has taken into account the psychologist's report dated 1 September 2020 for the applicant. The report by Ms Lois Li of LL Counselling states that in Ms Li's opinion Master Yang meets the criteria for the diagnosis of Adjustment Disorder with Mixed Anxiety and Depressed Mood. The report is based upon administering the applicant with a number of psychological tests and a previous psychological report of Mr Phil Gorrell dated 25 June 2018, which the Tribunal has also noted. Post-hearing at the Tribunal's request, the applicant provided a list from Ms Lois Li of her counselling sessions between September 2018 and September 2020. The applicant attended 10 separate sessions during this two-year period.
77. The applicant also discussed the situation pertaining to her son Master Yang. As discussed previously in this decision record, it is claimed that Master Yang has faced psychological health issues that have been exacerbated by the uncertainty surrounding his and the applicant's ability to remain in Australia and the applicant's own psychological challenges. The Tribunal notes the psychologist reports of Ms Lois Li from March and September 2020

and the claim that since the cancellation of the applicant's visa in 2017, Master Yang has ceased socialising, become angry, has been suspended a number of times and was bullied at his high school. The Tribunal has noted the school reports that have been submitted and the claims Master Yang believes he will be bullied much more seriously if he returns to PR China.

78. The Tribunal has considered the applicant's current circumstances. The Tribunal notes the testimony of the applicant and sponsor in relation to their own claimed relationship. The Tribunal accepts that relationships can have their own idiosyncrasies and unique traits. The Tribunal finds the claims made by the applicant and sponsor as to their relationship however, in many ways unfathomable and stretching credulity. The Tribunal notes that at the hearing the sponsor stated it was hard for him to name a specific time when his relationship with the applicant recommenced. The Tribunal noted that the sponsor had not returned from Adelaide to Sydney since departing early in the year until the day of the hearing – and he was to return immediately after the Tribunal's hearing. After such a long physical absence the Tribunal would have reasonably assumed the sponsor might wish to spend some further time with the applicant and Master Yang given the claims made pertaining to the current status of the applicant and sponsor's relationship, notwithstanding the needs of the sponsor's parents.
79. The Tribunal notes that the applicant has claimed in her oral testimony that she and the sponsor essentially never recommenced their relationship because it never ended and that she remained in close daily contact with the sponsor during their divorce. This is contrary to the basis on which the applicant was granted her divorce to the sponsor by the Court. The Court granted the divorce on the basis that the applicant and sponsor had lived separately and apart for at least twelve months and that there was no likelihood of resuming married life. The sponsor in his own oral testimony claimed he and the applicant had separated for 12 months but he was vague and non-specific. The Tribunal has reasonable concerns, given the applicant's claim the relationship never needed to recommence, that incorrect information was provided in her divorce application. The applicant at the hearing stated she didn't know the divorce process in Australia and a gentleman named Terry had worked on the application. The Tribunal notes that the applicant has again claimed a lack of knowledge – like in her visa application – in relation to her divorce application. The Tribunal found the applicant to be an intelligent and learned individual. It is not satisfied with the applicant's claims that she was unaware of her obligations and responsibilities when signing her name to these applications.
80. Despite the testimony of the sponsor and the claims of the applicant, the Tribunal is not satisfied that at present the applicant and sponsor are in a genuine and continuing relationship has been claimed. The Tribunal gives minimal weight to the applicant on the basis of her claimed relationship with the sponsor.
81. The Tribunal notes the psychological health claims of the applicant and Master Yang. The Tribunal accepts that the applicant has faced a challenging time given the cancellation of her visa and has received treatment as such. The applicant claims her treatment is ongoing at the time of decision. The Tribunal gives some positive weight to the applicant in this regard.
82. In relation to Master Yang, the Tribunal accepts he has faced some challenges due to the uncertainty of his and the applicant's status in Australia. The Tribunal has taken into account the reports and treatment plan of the psychologist Ms Li, who assessed Master Yang as "suffering from emotional, behavioural and social problems". The Tribunal notes that Master Yang's teacher, as outlined in the reports the applicant supplied the Tribunal, reported mild behavioural issues but no aggressive behaviours were reported. The Tribunal acknowledges that if the applicant's visa remains cancelled then the consequence in all likelihood is his own visa will be cancelled. The Tribunal notes that Master Yang will,

however, be able to return to PR China with the applicant and be able to live with his mother in PR China. The Tribunal acknowledges there will be some disruption to his already challenged school education, as well as to any treatment he is receiving for his psychological health. The Tribunal gives some positive weight to the applicant in regard to the present circumstances of her son.

83. The Tribunal gives the applicant's current circumstances some weight against cancelling her visa.

- **The subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act**

84. There is no evidence before the Tribunal that the applicant's behaviour concerning her obligations under Subdivision C of Division 3 of Part 2 of the Act have not been met. Given this, the Tribunal weighs this consideration neither in favour nor against cancelling her visa.

- **Any other instances of non-compliance by the visa holder known to the Minister**

85. There is no evidence or information of any other instances of non-compliance by the applicant. Given this, the Tribunal weighs this consideration slightly against cancelling her visa.

- **The time that has elapsed since the non-compliance**

86. The instances of non-compliance occurred when the applicant lodged her Partner visa application on 17 August 2011. At the hearing the applicant stated that she regretted the mistakes made with her Partner visa application and stated that she should have obtained assistance from a professional migration agent. Whilst the Tribunal concedes nine years is a lengthy period, it does not consider this period is of a significant duration to mean that the applicant's visa should not be cancelled. Given this, the Tribunal weighs this consideration slightly in favour of cancelling her visa.

- **Any breaches of the law since the non-compliance and the seriousness of those breaches**

87. At the hearing the applicant said she had not been in breach of the law since the non-compliance. There is no evidence before the Tribunal to the contrary. Given this, the Tribunal weighs this consideration slightly against cancelling the applicant's visa.

- **Any contribution made by the holder to the community**

88. At the hearing the applicant stated in response to the Tribunal's question that she had enrolled in an English language course in February 2012 to increase her proficiency. She said that she enjoyed life in Australia, particularly the clean air and the beach. She stated that she believed she had been making a contribution and noted she had previously worked and paid taxation. The Tribunal notes the applicant had previously stated that the care she provides for her son represents a contribution to the community. At the hearing the applicant also stated that she had donated blood in 2008 through the Red Cross and she had been involved in charity work for the elderly. She also raised her visits to the Temple.
89. The Tribunal gives these contributions little weight. Whilst the Tribunal accepts that the applicant paid income tax up until her employment ceased, the Tribunal considers this is no different to any other individual engaged in paid employment. The Tribunal furthermore notes that during this period the applicant enjoyed access to a wide range of Government

benefits and public resources funded through the Australian taxation system such as Centrelink and Medicare.

90. The Tribunal does not consider her English language courses as a contribution to the community, rather that is for the ultimate benefit of herself. The Tribunal accepts she has provided and continues to provide care to her son Master Yang. It does not accept or consider these actions of caring for her own son represents a benefit to the community, rather it is a reasonable expectation and obligation of a parent.
91. The Tribunal accepts that the applicant has donated blood but considers her general contribution to the community in the area of charity is limited.
92. The Tribunal gives the applicant's contribution to the community little weight. The Tribunal weighs this contribution neither in favour nor against cancelling the applicant's visa.

93. **Other matters**

94. While these factors must be considered, they do not represent an exhaustive statement of the circumstances that might properly be considered to be relevant in any given case: *MIAC v Khadgi* (2010) 190 FCR 248. The Tribunal may also have regard to lawful government policy. The relevant policy is set out in the Department's Procedural Advice Manual (PAM3) 'General visa cancellation powers', which refers to matters such as the consequences of cancelling the visa, international obligations and any other relevant matters.

- **Whether there would be consequential cancellations under s.140**

95. On 5 August 2015 the applicant's son Master Yang was granted a Subclass 101 Child visa on the basis he was sponsored by the applicant.
96. The Tribunal notes that s.140(2) of the Act states that if:
 - a. *a person's visa is cancelled under s.109 (incorrect information), 116 (general power to cancel), 128 (when holder outside Australia), 133A (Minister's personal powers to cancel visas on s.109 grounds), 133 (Minister's personal powers to cancel visas on s.116 grounds) or 137J (student visas); and*
 - b. *another person to whom subsection (1) does not apply holds a visa only because the person whose visa is cancelled held the visa;*
97. *the Minister may, without notice to the other person, cancel the other person's visa.*
98. The Tribunal notes the legislation makes clear that should a person not be entitled to hold permanent residency, then anyone that they have subsequently sponsored utilising that permanent residence may also have their visa cancelled. This, the Tribunal finds, is an intended consequence of the legislation.
99. The Tribunal notes that the applicant's son's Master Yang's Subclass 101 Child visa was cancelled pursuant to s.140(2).
100. The Tribunal accepts that affirming the delegate's decision may adversely impact upon Master Yang's Child visa.
101. The Tribunal has considered a consequential cancellation of Master Yang's visa under s.140(2) as a result of the cancellation of the applicant's visa. The Tribunal notes that

Master Yang, who is currently 13 years of age, will be able to return to PR China with his mother, the applicant, if both their visas are cancelled. The Tribunal considers the applicant and Master Yang will be able to depart Australia together and return, as citizens of PR China, to China and continue living together.

102. The Tribunal acknowledges that Master Yang is now in high school and has noted the claims of the applicant at the hearing as well as the reports of his psychologist Ms Li that he has no desire to return to PR China. The Tribunal discusses these matters in further detail later in this decision. The Tribunal has taken into account the fact his father is incarcerated in PR China and the claim expressed by the applicant – that her son will be victimised due to his father, but does not consider this to be a plausible reason as to why Master Yang cannot return. The Tribunal accepts that there would be a period of re-adjustment for Master Yang in returning to PR China but does not consider this to be either unusual or onerous if he returns with the applicant. Master Yang, from the evidence of the applicant, enjoys the strong support of the applicant who is able to provide him with emotional and practical support when recommencing his schooling in PR China. The Tribunal notes that Master Yang has spent the majority of his life in PR China, speaks Mandarin and, as discussed at the hearing, has his grandparents also residing in PR China. Whilst noting Master Yang has been in Australia since 2015, the Tribunal finds that Master Yang does not have extensive ties to Australia and is satisfied he will be able to reintegrate into life back in PR China.
103. On the evidence before it, the Tribunal weighs this consideration neither in favour nor against cancelling the applicant's visa.

- **Mandatory legal consequences of a decision to cancel the visa**

104. The Tribunal finds that the applicant and Master Yang will become unlawful non-citizens if their visas are cancelled and may be liable for detention under s.189 and removal under s.198 of the Act if they do not voluntarily depart Australia. The Tribunal notes that indefinite detention is a theoretical possibility if their visas were to be cancelled. The applicant and Master Yang however would have the opportunity to apply for a Bridging Visa E so that they may remain in Australia and in the community lawfully whilst making arrangements to leave. The Tribunal furthermore notes the s.48 bar and its potential impact on the applicant and Master Yang should their visas be cancelled. Section 48 of the Act imposes limitations upon applicants whose visa has been refused or cancelled while in Australia and essentially prevents applicants from applying for another visa or repeatedly applying for a visa while in Australia. The Tribunal acknowledges the challenges these present to the applicant and Master Yang but notes that these are the intended consequences of the legislation.
105. On the evidence before it, the Tribunal weighs this consideration neither in favour nor against cancelling the applicant's visa.

- **Whether the cancellation would lead to the person's removal in breach of Australia's non-refoulement obligations**

106. The Tribunal is not aware of any non-refoulement obligations which would be breached as a result of the cancellation. There is no evidence or claim made for Protection by the applicant or her son Master Yang.
107. The Tribunal has noted the applicant's claim that Master Yang will face bullying if he were to return to PR China. Whilst the Tribunal accepts that bullying can occur in the classroom as such, the Tribunal does not consider this would result in serious or significant harm to Master Yang as considered by the Act or would be in breach of Australia's non-refoulement obligations.

108. The Tribunal weighs this factor neither in favour nor against cancelling the visa.
- **International obligations – whether Australia has obligations under relevant international agreements that would or may be breached as a result of the visa cancellation.**
109. The Tribunal notes that in the applicant's NOICC response to the delegate that she submitted it would not be in the best interests of her son Master Yang for the family unit to be split and this was a primary consideration under Australia's obligations under the Convention on the Rights of the Child (CROC).
110. In submissions that were also made to the previously constituted Tribunal, it was asserted that Australia's obligations pursuant to the CROC might be breached as the applicant is Master Yang's guardian and consequently his interests could not be assured in case of separation that could potentially occur should her visa be cancelled and she be placed into detention. The Tribunal notes the submissions the applicant made to the previous Tribunal dated 22 November 2016 where it was asserted the best interest of Master Yang was that he continues to have a meaningful relationship with his mother, the applicant.
111. Ministerial Direction No 63, applies to the cancellation of Bridging E Visas where the grounds in r. 2.43(1)(p) or (q) of the Regulations (which include criminal charges), directs decision-makers to treat Best Interests of The Child (BIOC) as a primary consideration. For other Part 5 and 7 cancellations, such as the one currently before the Tribunal, there is no such Direction in force, but the Department's Visa Cancellation Instructions instruct delegates to treat BIOC as a primary consideration. The Tribunal notes that the delegate stated CROC should be taken into consideration and he acknowledged the integrity of the family unit was an important consideration.
112. The Tribunal put the applicant on notice at the hearing that, whilst the delegate had not treated BIOC as a primary consideration, in its own review it would be treating BIOC as a primary consideration. The Tribunal noted that courts have found generally it is in the best interests of the child to remain with their family.
113. The applicant has asserted that her son is now in high school and lived in Australia for a considerable period of time. She has asserted that he is now living contently in a family relationship with both herself and the sponsor with whom she claims she is in a genuine and continuing relationship.
114. In her previous submissions the applicant has claimed that should her visa be cancelled she will be detained and subsequently separated from her son Master Yang. She asserted at the time that Master Yang would have to go into foster care arrangements due to her likely detention as a result of her visa cancellation, and this will have a detrimental impact upon his development as he will be unable to have a continuous and meaningful relationship with the applicant. The Tribunal notes that this event did not occur after the cancellation of the applicant's visa. At the hearing the Tribunal raised this earlier submission with the applicant and her earlier concerns about foster care. The applicant conceded in her oral testimony that this was a concern that she held at that time rather than presently. The Tribunal nevertheless notes the earlier concern that the applicant would be detained and Master Yang would have to remain in Australia and go into foster care. The Tribunal notes the applicant has essentially now abandoned this particular claim and gives it no positive weight.
115. The applicant has asserted that this potential separation due to the applicant's potential detention will be in breach of the best interests of the child and contrary to the CROC. The Tribunal cannot however accept the applicant's submission that Master Yang will be

separated from her due to the cancellation of her visa, and this will have an adverse impact on him due to his subsequent inability to have a continuous relationship with the applicant.

116. The Tribunal does not accept that Master Yang will be separated from the applicant. This is because the applicant, as a citizen of PR China, can depart to PR China with Master Yang at anytime. Both Master Yang and the applicant have the legal right to return to and live in PR China as citizens. There is no requirement for Master Yang to remain in Australia. The Tribunal notes that Master Yang as a Chinese national will be able to return to PR China with his mother. The Tribunal does not consider on the evidence before it that cancellation of the applicant's visa would precipitate a breach of Australia's international obligations in relation to the CROC.
117. The Tribunal has considered the CROC in relation to the sponsor who, the applicant has claimed, she is in a genuine and continuing relationship with. The applicant and sponsor in their oral testimony both claimed Master Yang enjoys a good relationship with the sponsor. The Tribunal accepts for the purposes of this review that Master Yang has known the sponsor for some years and enjoys a cordial relationship with him. The Tribunal, however, notes that the sponsor is not a family member of Master Yang. The applicant and the sponsor divorced. As discussed at the hearing, the sponsor lived offshore for three years (making very occasional and brief claimed visits to the applicant when on holiday) and last year returned to Australia on a more long-term basis. Since that time he has not spent a significant time with Master Yang and the applicant. The Tribunal is not satisfied on the limited evidence before it that the applicant and sponsor are in a genuine and continuing relationship as the parties claimed both at the hearing and in their declarations, and subsequently is not satisfied there is anything more than a cordial friendship between the sponsor and Master Yang. The Tribunal discussed with the sponsor and the applicant the claimed relationship and the claimed ongoing financial support of the sponsor to the applicant and Master Yang. The Tribunal notes the claims by the sponsor at the hearing of a genuine and continuing relationship and his integral role in caring for Master Yang, but does not accept on the evidence there is anything more than a genial relationship between the sponsor and Master Yang through the applicant. The Tribunal does not consider there is a family unit consisting of the applicant, sponsor and Master Yang. The Tribunal considers Master Yang's family unit consists of the applicant. The Tribunal raised the possibility and likelihood of Master Yang returning to PR China with the applicant at the hearing. Given that there is no satisfactory reason Master Yang would not be able to travel to PR China to live with the applicant should her visa be cancelled and his consequentially cancelled, the Tribunal does not consider cancellation will result in the family unit being split and Australia at risk in breaching its obligations under CROC and treating the best interests of the child as a primary consideration. In the Tribunal's firm opinion, in such circumstances the best interests of Master Yang as a child are to travel with the applicant offshore to PR China.
118. At the hearing the applicant raised her concerns that she may be forced to separate from Master Yang because she may have to move to Nanjing or Shanghai to acquire employment. The Tribunal notes the applicant's claim is speculative. She stated the costs of living in these larger cities was higher and there were no government benefits. The Tribunal accepts that there may be greater employment opportunities in larger cities but is not satisfied on the scant evidence before it that Master Yang will be unable to remain with the applicant and attend school in these cities should his mother obtain employment there.
119. The Tribunal has noted the reports of the psychologist Ms Li relating to the various hardships Master Yang will purportedly face if he returns to PR China as well as his claimed behavioural issues. Ms Li has stated in her opinion Master Yang will find it difficult to readjust to life in PR China and will find the study and work environment very competitive. In her opinion he will struggle to catch up at school, socialise with his peers and potentially find a job when he is older. Ms Li writes that Master Yang may not be able to carry out his therapy

sessions. She states that 'the majority of Chinese people still believe only crazy people see a psychologist' and this will be a barrier to him receiving further treatment. Remaining in Australia, she asserts, will reduce his symptoms and improve his overall wellbeing.

120. The Tribunal acknowledges that there will likely be some psychological and emotional hardships to Master Yang from a decision to cancel the applicant's visa that flows on to a consequential cancellation of his own visa and the requirement that he must depart Australia. The Tribunal is not convinced however that, with his mother's support and the support of his wider family in PR China, that he will not be able to successfully reintegrate himself once he returns. The Tribunal notes that Master Yang has travelled to PR China since he arrived in Australia five years ago with the applicant. As the delegate's decision record notes, he visited in September 2017. As the applicant confirmed at the Tribunal's hearing, he remained in PR China after the applicant returned to Australia with his grandparents in September 2017. The Tribunal considers Master Yang will have strong family support should he return to PR China that will assist mitigate any emotional and psychological hardship. The Tribunal furthermore is not convinced without more substantive evidence that Master Yang will be unable to access any psychological assistance if he so requires in PR China in relation to his behavioural issues.
121. The Tribunal does not accept that Master Yang will be many years behind his peers at school and unable to get a job should he return to PR China. The Tribunal notes the evidence of his current challenges at school in Australia, but considers the conclusions the applicant has drawn as to Master Yang's future are largely speculative.
122. The Tribunal has noted the claims that Master Yang will be bullied by his peers if he returns to PR China due to his father's incarceration and his parent's divorce. The Tribunal notes that bullying can sadly occur in any classroom. The Tribunal is not convinced, given five years has now elapsed, that the fact that his mother, the applicant, is a divorcee or his father is incarcerated will lead to intolerable bullying of Master Yang. The Tribunal notes the lack of corroborative evidence of any bullying prior to his departure from PR China for Australia. The Tribunal accepts that there is a degree of emotional and psychological hardship due to what it accepts will be in the short term a challenging transition. It does not, however, consider these hardships mean that the applicant's visa should not be cancelled, even taking into account the Tribunal's decision that the best interests of the child is a primary consideration in this review. Given the Tribunal is satisfied that Master Yang need not and will not be separated from the applicant, the Tribunal is of the firm view that the best interests of Master Yang are to return to PR China with his mother and reunite with his wider family. Master Yang is a Chinese national and will be able to reside and study with the applicant and his wider family if he returns to PR China.
123. The Tribunal notes that it has considered the Best Interests of the Child as a primary consideration in this review. The Tribunal considered the best interests of the child on the evidence before it is for Master Yang to remain with his mother, the applicant, and reunite with his wider family, such as his grandparents in PR China. The Tribunal has taken into account the evidence concerning Master Yang's education in Australia since 2015 and the fact he has lived in Australia for a considerable time. The Tribunal accepts it may be in Master Yang's best interests to remain in Australia continuing his current studies. When, however, these interests are considered against all other considerations and considered as a whole, the valid exercise of the Tribunal's discretion to cancel the applicant's visa outweighs considerations such as Master Yang's education and the length of time he has lived in Australia.
124. The Tribunal has considered Australia's international obligations and whether Australia has obligations under relevant international agreements that would or may be breached as a result of the visa cancellation including the CROC and the best interests of the child being

Master Yang. Despite the Tribunal considering the best interests of the child as a primary consideration, on the basis of the evidence before the Tribunal, the Tribunal weights this consideration in favour of cancelling the applicant's visa.

- **Other considerations**

125. The Tribunal, noting the period of time the applicant has now been in Australia, has considered any ties she may have in Australia. The Tribunal notes from the applicant's evidence that she is not in employment in Australia. At the hearing she stated she does not own property in her name in Australia. The applicant does not have any other family in Australia other than Master Yang. The Tribunal notes that her sponsor is now in Australia as is his family, but notes it is not satisfied on the very limited evidence before it that a genuine and continuing relationship exists between the parties as has been claimed by the applicant and sponsor. The Tribunal has considered the applicant's ties to Australia and gives the consideration no weight against cancelling the applicant's visa.
126. As discussed in this decision record, the Tribunal has considered the hardship that may be imposed on the applicant should her visa remain cancelled. The Tribunal accepts that there will be a degree of hardship imposed on the applicant should her visa be cancelled. The Tribunal accepts that she would prefer to remain in Australia and acknowledges the challenges in reintegrating with life in PR China after a considerable period away. The Tribunal has particularly noted the evidence submitted in relation to her psychological health which includes the September 2020 reports of her current treating psychologist Ms Li and the June 2018 report of her then psychologist Mr Philip Gorrell. The Tribunal notes the diagnosis of an adjustment disorder with mixed anxiety and depression. The Tribunal is not convinced, however, that the applicant is unable to seek professional treatment if she so wishes in PR China. The applicant will have the emotional support and presence of both her son Master Yang, her parents and wider family in PR China. The sponsor, whom she has divorced and has been physically absent for the vast majority of the time since the Partner visa application was lodged in 2011, can choose to continue to provide the applicant with any claimed emotional support from either in Australia or offshore (current COVID -19 restrictions notwithstanding).
127. The Tribunal notes the applicant's embarrassment from the arrest and gaoling of her former husband and the corrosive impact local gossip had upon her as a former TV presenter and daughter of the local Head of Police. The Tribunal notes the article she presented pertaining to her husband is from April 2008, more than a dozen years ago. She had not been residing with her former husband for two years before that. The Tribunal notes that a considerable amount of time has elapsed since these events. Her father is now retired. The Tribunal does not accept that the applicant will be facing the same amount of local gossip and interest should she return to PR China and specifically her home town of Anqing City.
128. The Tribunal accepts that the applicant will face a range of hardships such as enrolling Master Yang in a new school, finding employment, finding a new residence and reintegrating into everyday life in PR China. The Tribunal submits that these challenges do not, however, mean the applicant's visa should not be cancelled. The Tribunal has considered any hardship the applicant may face should her visa be cancelled and she be compelled to return to PR China, and gives the consideration little weight against cancelling the applicant's visa.
129. The Tribunal has considered hardship that may be imposed on the sponsor. The Tribunal notes the applicant's and sponsor's testimony and the evidence that has been submitted as to their claimed relationship. The Tribunal accepts that the applicant and sponsor are well known to each other and are in a cordial relationship. The Tribunal does not, however, consider that this equates to a genuine and continuing relationship as they have claimed.

The Tribunal notes that the parties divorced in 2015 and the sponsor spent over three years subsequently offshore. Since 2015 the applicant and sponsor have only been together sporadically and for short periods of time. Despite the claims that have been made by the parties, on the limited corroborative evidence before it, the Tribunal has considerable doubts as to the genuineness of the applicant's and sponsor's claims pertaining to their relationship. The Tribunal accepts the parties have a friendship and are well known to each other but considers any hardship the sponsor will face should the applicant and Master Yang depart Australia is limited. The Tribunal has considered any hardship imposed on the sponsor and gives the consideration limited weight against cancelling the applicant's visa.

130. S.375A certificate

131. On 10 September 2020 the Tribunal wrote to the applicant in relation to a s.375A non-disclosure certificate that purportedly covered a number of documents in the Departmental file. In its correspondence, the Tribunal explained that it considered the certificate contained a valid ground of public interest immunity not to disclose the information. The Tribunal was satisfied that the certificate was valid as it contained a public interest reason that was specified with sufficient detail to identify the claimed harm that could result from its release. The applicant was invited to comment on or make submissions on the validity of the certificate.
132. The Tribunal, in accordance with s.359A, invited the applicant to comment on or respond to certain information. The Tribunal pointed out that the information pertained to material contained in the folios purportedly covered by the s.375A certificate and prevented from release by the Tribunal under s.375A of the Act. The Tribunal provided the 'gist' of the adverse information in the folios subject to the s.375A certificate to the applicant. The Tribunal noted that in the documents subject to the s.375A certificate there was information that the applicant authorised her mother-in-law to prepare the documents for her Subclass 309 Partner visa application and she was afraid her mother-in-law would disagree with the marriage so she never told her mother-in-law about her previous marriage and child. The Tribunal noted this was inconsistent with the applicant's claim the sponsor's stepfather Barry and the sponsor had assisted her with the Partner visa application forms. The Tribunal also put to the applicant information in the material subject to the s.375A certificate that in her application form she did not disclose her previous name was Yihong Ma.
133. On 17 September 2020 the applicant responded in writing to the Tribunal. The applicant stated that whilst her mother-in-law had assisted her in collecting supporting documents and with the actual lodgement of the visa application itself, the main form was completed by the sponsor's stepfather Barry with the sponsor. This was due to the limited English language capacity of the applicant's mother-in-law.
134. In relation to the failure to disclose her previous name Yihong Ma, the applicant explained that that was the name given to her at birth and used until she was about seven years of age. She stated that in or around 1989 she changed her name to Li Ma. She stated Yihong Ma remained, however, a nickname used by parents, close relatives and the sponsor.
135. The Tribunal accepts the applicant's explanations for both of these matters. The Tribunal has not drawn any adverse conclusions from the material subject to the s.375A certificate and put to the applicant under s.359A.

136. Conclusion

137. The Tribunal has taken into account and weighed up all relevant factors. The Tribunal considers the seriousness of the applicant's failure in the circumstances of this review to comply with the requirements of s.101 of the Act by the provision of demonstrably false

information in her application ultimately outweighs the considerations, including the primary consideration pertaining to the Best Interests of the Child Master Yang.

138. The Tribunal has decided that there was non-compliance by the applicant in the way described in the notice given under s.107 of the Act. Further, having regard to all the relevant circumstances, as discussed above, the Tribunal concludes that the visa should be cancelled.

139. **DECISION**

140. The Tribunal affirms the decision to cancel the first named applicant's Subclass 100 (Spouse) visa.

141. The Tribunal has no jurisdiction with respect to the other applicant.

142.

Justin Owen
Senior Member

ATTACHMENT – *Migration Act 1958* (extracts)

5 Interpretation

- (1) In this Act, unless the contrary intention appears:
- bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:
- (a) purports to have been, but was not, issued in respect of the person; or
 - (b) is counterfeit or has been altered by a person who does not have authority to do so; or
 - (c) was obtained because of a false or misleading statement, whether or not made knowingly.

97 Interpretation

In this Subdivision:

application form, in relation to a non-citizen, means a form on which a non-citizen applies for a visa, being a form that regulations made for the purposes of section 46 allow to be used for making the application.

passenger card has the meaning given by subsection 506(2) and, for the purposes of section 115, includes any document provided for by regulations under paragraph 504(1)(c).

Note: **Bogus document** is defined in subsection 5(1).

98 Completion of visa application

A non-citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.

99 Information is answer

Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.

100 Incorrect answers

For the purposes of this Subdivision, an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.

101 Visa applications to be correct

A non-citizen must fill in or complete his or her application form in such a way that:

- (a) all questions on it are answered; and
- (b) no incorrect answers are given or provided.

107 Notice of incorrect applications

- (1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:
- (a) giving particulars of the possible non-compliance; and
 - (b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:
 - (i) if the holder disputes that there was non-compliance:
 - (A) shows that there was compliance; and
 - (B) in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance—shows cause why the visa should not be cancelled; or
 - (ii) if the holder accepts that there was non-compliance:
 - (A) give reasons for the non-compliance; and
 - (B) shows cause why the visa should not be cancelled; and
 - (c) stating that the Minister will consider cancelling the visa:

- (i) if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or
 - (ii) if the holder gives the Minister a written response within that period—when the response is given; or
 - (iii) otherwise—at the end of that period; and
- (d) setting out the effect of sections 108, 109, 111 and 112; and
- (e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and
- (f) requiring the holder:
 - (i) to tell the Minister the address at which the holder is living; and
 - (ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non-compliance by the holder—to tell the Minister the changed address.
- (1A) The period to be stated in the notice under subsection (1) must be:
 - (a) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or
 - (b) otherwise—14 days.
- (1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:
 - (a) visas of a stated class; or
 - (b) visa holders in stated circumstances; or
 - (c) visa holders in a stated class of people (who may be visa holders in a particular place); or
 - (d) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.
- (2) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.

108 Decision about non-compliance

The Minister is to:

- (a) consider any response given by a visa holder in the way required by paragraph 107(1)(b); and
- (b) decide whether there was non-compliance by the visa holder in the way described in the notice.

109 Cancellation of visa if information incorrect

- (1) The Minister, after:
 - (a) deciding under section 108 that there was non-compliance by the holder of a visa; and
 - (b) considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and
 - (c) having regard to any prescribed circumstances;
 may cancel the visa.
- (2) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist circumstances declared by the regulations to be circumstances in which a visa must be cancelled.